In the Supreme Court
OF THE
United States

OCTOBER TERM, 1946

No. 1165 57

ALBERT FEIGENBAUM, *Petitioner,*

vs.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR WRIT OF CERTIORARI
to the United States Circuit Court of Appeals
for the Ninth Circuit
and
BRIEF IN SUPPORT THEREOF.

LEO R. FRIEDMAN,
Russ Building, San Francisco 4, California,
Attorney for Petitioner.

Subject Index

	Page
Petition for writ of certiorari	1
Statement of the case and the matters involved	2
Jurisdictional statement	10
1. Jurisdiction of the court	10
2. The decisions and judgments of the Circuit Court of Appeals	10
3. Basis upon which it is contended the Supreme Court has jurisdiction and cases in support thereof	10
The questions presented	12
Points relied upon for the issuance of the writ of certiorari	14
Brief in support of petition for writ of certiorari	19
The opinions and judgments of the court below	19
Grounds on which the jurisdiction of this court is invoked and cases believed to sustain the jurisdiction	20
Statement of the case	21
Summary of the evidence	24
1. Testimony relating to the business, etc., of the Francisco Distributing Company	25
2. Testimony of Nathanson as to the maximum prices for the sale of old Mr. Boston Rocking Chair Whiskey	26
3. Incident of the sale to Dopey Norman's	26
4. Incident of the first unidentified salesman	28
5. Incident of the second unidentified salesman	29
6. Incident of the third unidentified salesman	30
7. Incident of the fourth unidentified salesman	30
8. Incident of the sale by Blumenthal to Lombardi	31
9. Incident of the sale to Fingerhut and Travis	32
10. Incident of the Feigenbaum-Taylor sale	33
Specifications of errors relied on	38
Argument	39

Page

1. The evidence was insufficient to establish the single conspiracy charged in the indictment 39

2. The lower court, in order to establish the conspiracy charged, has resorted to the acts and declarations of Feigenbaum's co-conspirators, such evidence being incompetent for such purpose 49

3. The refusal to give Feigenbaum's requested instructions 27, 28 and 29 constitutes reversible error as being a misdirection of the jury on a basic issue 53

4. The majority opinion is in error in holding that the offense could be laid under the general conspiracy statute of the United States 56

Conclusion 60

Table of Authorities Cited

Cases	Pages
Berger v. United States, 295 U. S. 78	41, 42
Bollenbach v. United States, 326 U. S. 607, 90 L. ed. 318	11, 15, 21, 55
Brady v. United States, 24 Fed. (2d) 399	44
Dept. of Treasury v. Ingram-Richardson Mfg. Co., 313 U. S. 252, 85 L. ed. 1313	12
Dolan v. United States (CCA-9), 123 Fed. 52	52
Federal Trade Com. v. Raladam Co., 316 U. S. 149, 86 L. ed. 1336	11, 21
Fiswick v. United States, ... U. S. ...; 91 L. ed. Ad. Op. 183	14, 20
Gebardi v. United States, 287 U. S. 119, 77 L. ed. 209	58
Glasser v. United States, 315 U. S. 60, 86 L. ed. 680	14, 20, 51
Kotteakos v. United States, 328 U. S. ..., 91 L. ed. Ad. Op. 1178	9, 10, 11, 14, 20, 21, 41, 44, 47, 48
Kuhn v. United States (CCA-9), 26 Fed. (2d) 463	52
Marcenty v. U. S., 49 Fed. (2d) 156	57
Morrison v. California, 291 U. S. 82, 54 S. Ct. 281, 78 L. ed. 664	57
Norris v. United States, 34 Fed. (2d) 839	58
Pinkerton v. United States, ... U. S. ..., 90 L. ed. Ad. Op. 1212	59
Sugarman v. United States (CCA-9), 35 Fed. (2d) 663	52
Thomas v. United States (CCA-10), 57 Fed. (2d) 1039	14, 51
Tinsley v. United States (CCA-8), 4 Fed. (2d) 891	14
U. S. v. Katz, 271 U. S. 354, 7 L. ed. 986	58
U. S. v. Ross, 2 Otto 281, 23 L. ed. 707	44
United States v. Sager, 49 Fed. (2d) 725	58

Pages

Vernon v. United States, 146 Fed. 121 44

Wright v. United States, 108 Fed. 805 57

Statutes

Emergency Price Control Act, (50 U.S.C.A. App.) 20, 56

Judicial Code, Section 240(a) (28 U.S.C.A., Sec. 347) ... 10, 20

18 U.S.C.A., Sec. 88 ..... 2, 7, 11, 56

In the Supreme Court
OF THE
United States

OCTOBER TERM 1946

No.

ALBERT FEIGENBAUM,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Circuit Court of Appeals for the Ninth Circuit.

To the Honorable Fred M. Vinson, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

The petition of Albert Feigenbaum for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit respectfully shows:

STATEMENT OF THE CASE AND THE MATTERS INVOLVED.

Petitioner, Albert Feigenbaum, together with Harry Blumenthal, Louis Abel, Lawrence B. Goldsmith and Samuel Weiss, was indicted for the crime of conspiracy. (18 U.S.C.A., sec. 88.) After trial by jury all of the defendants were convicted.* The indictment (R. 3-6) charged the five defendants with conspiring to sell whiskey in excess of the maximum price established by law. The pertinent portion of the indictment charged defendants with conspiring to

> * * * sell at wholesale certain distilled spirits, to-wit, Old Mr. Boston Rocking Chair Whiskey, in excess of and higher than the maximum price established by law, said maximum price at wholesale then and there being **not in excess of $25.27 per case** of twelve bottles, each of said twelve bottles containing one-fifth of one gallon of said Old Mr. Boston Rocking Chair Whiskey, in violation of Sections 902(a), 904(a), and 925(b) of Title 50 U.S.C.A. App., and Office of Price Administration Regulations: Maximum Price Regulation 193 and Maximum Price Regulation 445."

Then follow ten alleged overt acts which need not be set forth herein, it being sufficient to point out that the overt act latest in date is laid as of January 10, 1944. (R. 5.)

All of the evidence introduced at the trial was produced by the United States, and is properly summarized as follows:

---

*Each of the five defendants took a separate appeal and four defendants are filing a separate petition with this Court for a writ of certiorari. The appeal was heard upon a single record.

The defendant Goldsmith, doing business under the name of Francisco Distributing Company, was lawfully engaged in the wholesale liquor business at San Francisco, California and had procured all the necessary permits and paid all necessary taxes so to do; that during the month of December, 1943, Goldsmith received a shipment of 4040 cases of Old Mr. Boston Rocking Chair Whiskey; that the "ceiling price" at which he could sell this whiskey was $25.27 per case.

The evidence further showed a series of isolated and unconnected sales involving no more than 1575 cases of the whiskey. These individual sales were made at various times, in unrelated localities and to individual tavern or saloon operators by three unidentified persons and by defendants Abel, Blumenthal and Feigenbaum—no two of the sellers ever acting together. The *modus operandi* of these sales was practically the same in each instance. In some cases the tavern owner sought out the seller, in others the seller sought out the tavern owner. The seller would tell the buyer that he could get him some whiskey but it would cost from $55 to $65 a case. The number of cases being agreed upon, the seller would tell the buyer that he must make out a check payable to Francisco Distributing Company for an amount equal to $24.50 per case times the number of cases ordered and that the difference between the amount of the check and the total agreed price was to be paid to the seller in cash.

The only proof as to Goldsmith was that he received the checks computed on the basis of $24.50

per case, sent the cases of whiskey to the buyer and issued an invoice in the name of the buyer for the number of cases purchased and the amount in dollars thereof. The record of these transactions was entered on the forms provided by the Alcohol Tax Unit.

The only evidence as to petitioner Feigenbaum was that he operated the Sunset Drug Store in San Francisco; that he purchased 100 cases of the whiskey for himself at $24.50 per case; that he agreed to get 100 cases for two men named Taylor and Humes who operated a tavern in Shasta County, California; that Taylor and Humes contacted him and he charged them $64 per case, the payment being made as outlined above.

There was no evidence in the case, either direct or circumstantial, showing that any two of the defendants were acquainted (with the possible exception of Goldsmith and Weiss) or that any one defendant knew of the existence of any of the others or that any of the others were engaged in any sales of the whiskey. There was no evidence to show that Goldsmith ever received any amount for the whiskey over $24.50 per case.

As the trial proceeded the different purchasers of the whiskey testified as to their dealings with the different defendants and the unidentified salesmen. No witness made any claim that he ever had any transaction with more than one of the defendants, or that he had ever known or seen more than one of the defendants. Those who purchased from the unidentified sellers were unable to identify any of the

defendants. When such testimony was produced counsel for each defendant who was not affected by it promptly objected to the admission thereof on the grounds that the same was hearsay as to him, was *res inter alios acta*, and that the acts and declarations of his alleged co-conspirators were inadmissible as to him until there had been proof made of the existence of the conspiracy charged and such defendant's connection therewith by evidence independent of such acts and declarations.

The trial judge then made the following ruling (R. 255): that all testimony offered by the Government would be admitted only against that defendant to whom it related, leaving to the Government the right at the conclusion of its case to make a motion to admit all evidence in the case against all of the defendants.

At the conclusion of the Government's case the prosecutor moved the admission of "all evidence which has been admitted against any defendant as against all the defendants and * * * all documents marked for identification to be admitted against all defendants." (R. 390-391.) Petitioner and his co-defendants made general and specific objections to such admission on the grounds hereinabove set forth (R. 391-409; Feigenbaum's Assignment of Error XVII, sub-assignments A to W; R. 106-121.) The trial Court granted the Government's motion, with the sole exceptions of limiting certain testimony given by the witness Harkins to Goldsmith and Weiss. (R. 417.) Exceptions were taken to the Court's ruling. (R. 409.)

At the conclusion of the Government's case petitioner Feigenbaum moved the Court for an instructed verdict of not guilty as to him upon the grounds (1) that the evidence was insufficient to support a verdict or judgment of guilty as to him; (2) that the offense sought to be charged in the indictment had not been proved by the Government; (3) that the evidence was insufficient to prove the alleged conspiracy set forth in the indictment; (4) that the evidence was insufficient to prove that Feigenbaum was a member of or identified with the conspiracy charged in the indictment; (5) that the evidence adduced by the Government did not exclude every other hypotheses except that of guilt; and (6) that the only evidence tending to establish the conspiracy charged and Feigenbaum's connection therewith consisted of extra judicial acts and declarations of alleged co-conspirators, done and made out of Feigenbaum's presence and without his knowledge, authorization or consent. (R. 421-2.) The Court denied such motion to which an exception was properly noted. (R. 422.)

Feigenbaum requested the trial judge to give to the jury his requested instructions Nos. 27, 28 and 29. (R. 133, 134, 135.) Each of these instructions was to the effect that, as to Feigenbaum, in determining whether the conspiracy charged in the indictment existed and that Feigenbaum was a member thereof, the jury could not consider any evidence relative to the acts and declarations of any of Feigenbaum's alleged co-conspirators said or done out of Feigenbaum's presence, but that such conspiracy and Feigenbaum's connection therewith had to be established

by evidence independent of such acts and declarations. The Court refused to give such instructions, to which refusal Feigenbaum duly excepted. (R. 449.) The Court gave no other instructions covering the legal proposition; but, in effect, instructed the jury directly contrary thereto. (R. 443.)

After the verdict of guilty petitioner filed written motions for a new trial and in arrest of judgment (R. 40, 41), which motions were denied by the Court.

In support of his appeal Feigenbaum advanced each of the grounds on which was based his motion for a new trial plus the errors in the giving and refusal of the foregoing instructions. He also advanced the contention that the indictment failed to state a crime against the United States or one that the Court had jurisdiction to try for the reason that the Emergency Price Control Act made it a substantive offense punishable as a misdemeanor for persons to agree to sell commodities over the ceiling price established by the price administrator and, therefore, the offense was not one that could be charged, tried or punished as a felony under the general conspiracy statute. (18 U.S.C.A., sec. 88.)

The Circuit Court of Appeals presided over by Judges Denman, Healy and Bone, rendered a decision ruling against petitioner's contentions and upholding the judgment. (R. 482.) Thereafter petitioner and each of his co-defendants filed petitions for rehearing which were denied by an order signed by Judges Healy and Bone. (R. 499.) **Judge Denman** dissented from the order denying a rehearing and **withdrew his**

concurrence in the original decision of the Court (R. 499) and filed an opinion "as a dissent to the Court's opinion filed on December 16, 1946". (R.500.) The dissenting opinion of Judge Denman was based on two propositions, viz.: that as to Abel, Blumenthal and Feigenbaum the evidence merely showed them "to have been black marketers and (each of them) should have been prosecuted for selling whiskey at above ceiling prices." Judge Denman's opinion further points out (R. 500):

> "The court's opinion is bare of facts, as is the evidence,
>
> (1) That any of these three knew or was in any communication with any others of them;
>
> (2) That any knew that any other obtained whiskey from the defendants Goldsmith and Weiss;
>
> (3) That any of the three sellers knew that any other of them bought the whiskey from the so-called 'common pool' of whiskey in the warehouse—a common pool only in the sense that each separately obtained his whiskey from it, but not a pool of which any of the three had common knowledge that any other of them had obtained his whiskey from it;
>
> (4) That any knew that any other bought his whiskey at the same below-ceiling price;
>
> (5) That any knew that any other sold his whiskey at the same or similar over-ceiling prices.
>
> The obvious inference from the above proof and absence of other proof is that the unknown owner of the whiskey referred to in the court's opinion used each of Abel, Blumenthal and

> Feigenbaum *separately* as his agent to violate the law. This would constitute several separate conspiracies between the unproved owner and each of the proved sellers, but not a conspiracy among all four of them." (Italics by Judge Denman.)

Following the foregoing, Judge Denman concludes that the record is controlled by the decision of this Court in *Kotteakos v. United States*, 328 U. S. ....., 91 L. ed. Ad. Op. 1178, 1181, and that the evidence merely established a series of independent conspiracies, that the owner of the whiskey was "the common hub from which extended the three illicit sales conspiracies as spokes, but with no binding rim" connecting them together. Judge Denman further concludes that, so far as the crime charged in the indictment is concerned, the evidence was not inconsistent with every reasonable hypotheses of innocence.

The majority opinion of the Appellate Court holds the evidence sufficient to establish the single conspiracy charged and arrives at this holding **by piling inference upon inference** and by stating that as the jury found but the one conspiracy such finding could not be disturbed by the Court. All of which is in direct conflict with the express decisions of this Court.

To demonstrate the correctness of both Judge Denman's statements and petitioner's contention that the evidence fails to establish any facts even tending to prove the single conspiracy charged, we will set forth a full and complete summary of testimony of each witness in the brief filed in support of this petition.

JURISDICTIONAL STATEMENT.

1. Jurisdiction of the Court.

The jurisdiction of this Court is invoked under section 240 (a) of the Judicial Code as amended. (28 U.S.C.A., sec. 347.)

2. The decisions and judgments of the Circuit Court of Appeals.

The decision and judgment of the Circuit Court of Appeals was rendered on December 16, 1946. (R. 482.) The petition for rehearing was denied by two judges of the respondent Court on February 28, 1947. (R. 499.) The opinion of Judge Denman withdrawing his concurrence in the original opinion filed by the Court was filed on February 28, 1947. (R. 500.)

3. Basis upon which it is contended the Supreme Court has jurisdiction and cases in support thereof.

The basis upon which it is contended that the Supreme Court has jurisdiction herein and the cases believed to support such jurisdiction are as follows:

(a) The majority opinion upholds the convictions upon a record establishing not a single conspiracy but several independent and unrelated transactions without any unity of purpose, common design or undertaking between the various defendants charged in direct conflict with the decision of this Court in the following case, in which the Court exercised its jurisdiction to review the erroneous judgment.

Kotteakos v. United States, 328 U. S. ....., 90 L. ed. Ad. Op. 1178.

(b) The majority opinion holds that the guilt of one charged with conspiracy can be upheld solely on the acts and declarations of his alleged co-conspirators said or done out of his presence and without his knowledge or consent. This is directly contrary to the rulings of this Court in the case of *Kotteakos v. United States*, supra, in which the Court exercised its jurisdiction to review the judgment based on such erroneous holdings.

(c) The majority opinion of the Circuit Court of Appeals erroneously holds that a conspiracy to sell commodities at prices higher than the maximum price established under the Emergency Price Control Act can be prosecuted as felony under the general conspiracy statute of the United States. (18 U.S.C.A., sec. 88), although sec. 205 (b) of the act makes such conspiracy a misdeameanor.

Where there is a misconstruction of a statute by the Appellate Court this Court has jurisdiction to correct such error by writ of certiorari. See, *Federal Trade Com. v. Raladam Co.*, 316 U. S. 149, 150, 86 L. ed. 1336, 1339.

(d) The District Court misdirected the jury on a basic issue and the Appellate Court upheld such action. Thus, the jury were advised that the existence of the conspiracy as to Feigenbaum and his connection therewith could be established by the acts and declarations of his alleged co-conspirators. (R. 440, 441, 442, 444.) Where the Court has misdirected the jury on a basic issue this Court will review such action in a certiorari proceeding. See, *Bollenbach v. United States*, 326 U. S. 607, 90 L. ed. 318.

(e) Without proof of the single conspiracy charged and petitioner's connection therewith, the majority opinion upheld the action of the trial Court permitting the jury to consider overt acts done out of petitioner's presence by an alleged co-conspirator as proof of the conspiracy charged and petitioner's connection therewith. This is directly contrary to the ruling of this Court in *Kotteakos v. United States*, supra, in which this Court exercised its jurisdiction in certiorari to collect such errors.

(f) The majority opinion is in conflict with applicable decisions rendered by the Circuit Court of Appeals in other circuits (as will be amplified in the brief filed in support herewith.) Under such circumstances this Court has jurisdiction on certiorari to review the action of respondent Court. See, *Dept. of Treasury v. Ingram-Richardson Mfg. Co.*, 313 U. S. 252, 253, 85 L. ed. 1313, 1315.

THE QUESTIONS PRESENTED.

The questions presented and raised by this petition are as follows:

1. Where five people are charged and convicted of a single conspiracy, can such conviction be sustained where the evidence only establishes several separate and distinct conspiracies in each of which no more than two of the five named defendants participated?

2. In the trial of five persons charged with conspiracy can the conviction of one be upheld where the

only proof of the conspiracy and such person's connection therewith consists of the acts and declarations of his alleged co-conspirators?

3. Can a person be convicted of conspiracy solely upon proof of overt acts alleged in the indictment which were done by alleged co-conspirators out of the presence of the person convicted and without his knowledge or consent?

4. In a trial for conspiracy is not the refusal to charge the jury, that, in determining the existence of the conspiracy and defendant's connection therewith, the acts and declarations of such person's alleged co-conspirators cannot be considered, a misdirection of the jury on a basic issue which necessitates a reversal of the cause?

5. In a trial for conspiracy is it not a misdirection of the jury on a basic issue, necessitating the reversal of the cause, for the Court to instruct the jury that in determining any one defendant's guilt or innocence the acts or declarations of his co-defendants, said or done out of his presence, can be considered in establishing the existence of the conspiracy and such defendant's connection therewith?

6. Where a statute of the United States makes it a misdemeanor for persons "to agree" to do a prohibited act, does not such statute remove any prosecution for so agreeing from the general conspiracy statute of the United States punishing conspiracies as a felony?

POINTS RELIED UPON FOR THE ISSUANCE OF THE WRIT OF CERTIORARI.

1. The holding of the majority opinion of the Appellate Court, that where a single conspiracy is charged proof of several independent conspiracies in which no two of the same defendants were involved is sufficient to support the charge, is in direct conflict with applicable decisions of this Court such as *Kotteakos v. United States,* 328 U. S. ....., 90 L. ed. Ad. Op. 1178; *Fiswick v. United States,* ..... U. S. ..... 91 L. ed. Ad. Op. 183; and is in conflict with comparable decisions of other Circuit Courts of Appeals, such as the cases of *Tinsley v. United States* (CCA-8), 4 Fed. (2d) 891; *Thomas v. United States* (CCA-10), 57 Fed. (2d) 1039.

2. The majority opinion holding that the guilt of one charged with conspiracy can be established solely by the acts and declarations of his alleged co-conspirators is contrary to the decisions of this Court, such as *Kotteakos v. United States,* supra, *Glasser v. United States,* 315 U. S. 60, 86 L. ed. 680.

3. The majority opinion holding that an agreement to violate the Emergency Price Control Act by selling whiskey above the ceiling price, which is made a misdemeanor by the act, can be prosecuted as a felony under the general conspiracy statute, is a misconstruction of the statute.

4. The majority opinion holding that there was no misdirection of the jury in the trial Court's refusal to instruct that Feigenbaum's guilt had to be established by evidence independent of the acts and declarations

of his alleged co-conspirators is in conflict with the comparable decision of this Court rendered in the case of *Bollenbach v. United States*, 326 U. S. 607, 90 L. ed. 318.

5. That each of the matters passed upon in the majority opinion of the Circuit Court of Appeals is an important question of general law and decided in a way not tenable and in conflict with the weight of authority.

Wherefore, and for the reasons herein stated, petitioner respectfully prays that this Honorable Court issue a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit to the end that the questions involved may be fully presented and argued and justice done in the premises.

Dated, San Francisco, California,
March 24, 1947.

Respectfully submitted,
LEO R. FRIEDMAN,
Attorney for Petitioner.

CERTIFICATE OF COUNSEL.

I hereby certify that I am a member of the bar of the Supreme Court of the United States and that I am counsel for the petitioner in the above-entitled cause and that, in my judgment, the foregoing petition is well founded in point of law as well as in fact and that said petition is not interposed for delay.

Dated, San Francisco, California,
March 24, 1947.

LEO R. FRIEDMAN,
Attorney for Petitioner.

In the Supreme Court

OF THE

United States

OCTOBER TERM 1946

No.

ALBERT FEIGENBAUM,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

THE OPINIONS AND JUDGMENTS OF THE COURT BELOW.

The judgment of the trial Court was rendered and filed on May 24, 1945. (R. 53.)

The majority opinion of the Appellate Court was rendered and filed on December 16, 1946. (R. 482.)

The dissenting opinion of Judge Denman was filed on February 28, 1947. (R. 505.)

A petition for rehearing was denied by the Court below on February 28, 1947. (R. 505.)

The judgment of the Appellate Court was entered on December 16, 1946. (R. 504.)

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED AND CASES BELIEVED TO SUSTAIN THE JURISDICTION.

The jurisdiction of this Court is invoked under the provisions of Section 240(a) of the Judicial Code. (28 U. S.C.A., sec. 347.)

The ground on which the jurisdiction of this Court is invoked and the cases believed to sustain the jurisdiction are as follows:

1. The majority opinion sanctions the conviction of one charged with conspiracy upon proof that does not establish the single conspiracy charged but establishes several independent and unrelated transactions in which no two of the same defendants were involved, which holding is in direct conflict with the decisions of this Court in the followng cases, in each of which this Court exercised its jurisdiction to review the erroneous judgment: *Kotteakos v. United States,* 328 U. S. ....., 90 L. ed. Ad. Op. 1178; *Fiswick v. United States,* ..... U. S. ....., 91 L. ed. Ad. Op. 183.

2. The majority opinion rules that the guilt of one charged with conspiracy can be upheld solely on proof of the acts and declarations of his alleged co-conspirators, which holding is directly contrary to the rulings of this Court in the cases of *Kotteakos v. United States,* supra and *Glasser v. United States,* 315 U. S 60, 86 L. ed. 680, in each of which cases this Court reviewed the question on certiorari.

3. The majority opinion holding that an agreement to violate the Emergency Price Control Act (50 U.S.C.A. App.), can be prosecuted as a felony under

the general conspiracy statute is a misconstruction of the act and this Court has jurisdiction to correct such error by writ of certiorari. *Federal Trade Com. v. Raladam Co.*, 316 U. S. 149, 150, 86 L. ed. 1336, 1339.

4. The majority opinion held that no prejudicial error occurred when the trial Court misdirected the jury on a basic issue by charging the jury that they could determine the existence of a conspiracy and petitioner's connection therewith solely on the evidence establishing acts and declarations of his alleged co-conspirators, and in refusing to give requested instructions to the contrary. In *Bollenbach v. United States*, 326 U. S. 607, 90 L. ed. 318, this Court held that the misdirection of the jury on a basic issue was reversible error and reviewed such a situation on certiorari.

5. Without proof of the single conspiracy charged and petitioner's connection therewith, the majority opinion upheld the action of the trial Court permitting the jury to consider overt acts done by alleged co-conspirators in separate conspiracies of which petitioner was not a member. This holding is directly contrary to the rulings of this Court in the *Kotteakos* case, in which this Court corrected similar error on certiorari.

STATEMENT OF THE CASE.

All of the evidence in the case was produced by the Government. Neither petitioner, nor his co-defendants, offered any evidence.

The indictment in the case (R. 3-6), charged defendants with conspiring to sell Old Mr. Boston Rocking Chair whiskey at a price in excess of and higher than the sum of $25.27 per case, said latter sum being the maximum wholesale price established by law for the sale of such whiskey.

The evidence established that Goldsmith, doing business as the Francisco Distributing Co., acquired for resale at wholesale 4040 cases of the named whiskey, that of this amount approximately 1575 cases were sold to various tavern operators at various times and in unrelated localities, by three unidentified persons, and that sales were also made by defendants Abel, Blumenthal and petitioner Feigenbaum; no two of the sellers ever acting together, and no purchaser ever having known or dealt with more than one of the defendants. The sales were made at prices ranging from $55 to $65 per case and in each instance the seller required the purchaser to make a check, payable to the Distillers' Distributing Company for the amount of whiskey purchased at $24.50 per case and to pay to the man making the sale the difference in cash. On Goldsmith's company receiving the check the number of cases of whiskey would be sent to the purchaser, together with an invoice for such number of cases, at the price of $24.50 a case. Goldsmith never received more than $24.50 per case.

As the trial proceeded each individual purchaser of the whiskey testified as to his dealing with the particular defendant or an unidentified salesman. When such testimony was adduced, counsel for each defend-

ant who was not affected by it objected to the admission thereof on the grounds that the same was hearsay as to him, was *res inter alios acta,* and that the acts and declarations of his alleged co-conspirators were inadmissible as to him until independent proof had been made of the conspiracy charged and his connection therewith. The trial judge then made an order (R. 255) that all testimony offered by the Government would be admitted only against that defendant to whom it related, leaving to the Government the right to move, at the conclusion of its case, to admit all evidence in the case against all defendants.

At the conclusion of the Government's case such motion was made by the prosecutor. (R. 390-391.) Petitioner and his co-defendants objected generally to the granting of the motion and made specific objections to each item thereof on the grounds set forth above. (R. 391-409, Feigenbaum's Assignment of Error XVII, sub-assignments A to W; R. 106-121.) The trial Court granted the Government's motion, with the sole exception of limiting certain testimony given by the witness Harkins to Goldsmith and Weiss. (R. 417.) Exceptions noted. (R. 409.)

The only evidence as to petitioner Feigenbaum was that he operated the Sunset Drug Store, in San Francisco, that he purchased 100 cases of the whiskey for himself at $24.50 a case, that he agreed to get 100 cases for two men named Taylor and Humes, who operated a tavern in Shasta County, California, that Taylor and Humes had contacted Feigenbaum and he charged them $64 a case, the payment being made as outlined above.

Petitioner contended that there was no evidence in the case showing that any two of the defendants were acquainted (except possibly Goldsmith and Weiss) or that any one of the defendants knew of the existence of any of the others or that any of the others were engaged in the sales of the whiskey or in the purchase thereof from Francisco Distributing Co. There was no evidence to show that Goldsmith ever received any amount for the whiskey over $24.50 per case or that he knew that any one was reselling it at more than the ceiling price.

Judge Denman, in his dissenting opinion, emphasizes the lack of evidence in the foregoing particulars and points out that the evidence only established separate and independent conspiracies. (R. 500.)

To demonstrate the correctness of petitioner's contention and Judge Denman's holdings and conclusions we here set forth a complete summary of the testimony of each witness with appropriate references to the record.

SUMMARY OF THE EVIDENCE.

The evidence may be divided into the following subdivisions: (a) the evidence relating to the business and permits of the Francisco Distributing Company; (b) the testimony of Nathanson as to the maximum price for the sale of Old Mr. Boston Rocking Chair Whiskey; and (c) eight separate incidents of isolated transactions involving the sale of whiskey.

1. **Testimony relating to the business, etc., of the Francisco Distributing Company.**

These preliminary matters were developed on the examination of the Government's witnesses Almon C. Jones (R. 243), Robert Grubbs (R. 250), Fred H. Sander (R. 251) and Frank Ditto (R. 265). In substance this testimony is to the effect that a Wholesaler's Basic Permit had been issued to L. B. Goldsmith, doing business as the Francisco Distributing Company, and thereafter an amended permit was issued to show the withdrawal of one S. S. Weiss from the partnership. Certain documents were produced (U. S. Exhibits 2-6) as having been filed with the Alcohol Tax Unit showing purchases and sales of liquor made by the Francisco Distributing Company for March, 1942, to January, 1944, included therein being two documents entitled "Wholesale Liquor Dealers' Monthly Report, summary of forms 52-A and 52-B". (U. S. Exhibits 2 and 3.) These documents show the purchases of the Francisco Distributing Company during the months of December, 1943 and January, 1944, and disposition of merchandise sold. These latter two exhibits showed the purchase by Francisco Distributing Company of 4040 cases of Old Mr. Boston Rocking Chair Whiskey.

The testimony of these witnesses further showed that two carloads of whiskey had been purchased by the Francisco Company through the Penn Midland Import Company of New Jersey from Ben Burke, Inc. amounting to said 4040 cases. The draft for the payment of the two carloads of whiskey was ordered paid out of the bank account of the Francisco Distributing

Company by Goldsmith. Sander testified that a Mr. Weiss gave him instructions as to the unloading of the two freight cars.

2. Testimony of Nathanson as to the maximum prices for the sale of old Mr. Boston Rocking Chair Whiskey.

The witness Nathanson gave no testimony relating to any of the defendants or their transactions. He testified that he was familiar with M.P.R. 445 published in Federal Register 11161, which established the maximum price per case for the sale by a wholesaler of a case of twelve bottles each containing one-fifth of a gallon of Old Mr. Boston Rocking Chair Whiskey distilled by Ben Burke, Inc. (R. 274-5); that the maximum selling price per case would be $25.27 from the wholesaler to the retailer f.o.b. San Francisco. (R. 277.)

3. Incident of the sale to Dopey Norman's.

Norman Reinburg testified that he owned a saloon in Vallejo under the name of Dopey Norman's; in December, 1943, and in January, 1944, he purchased some Old Mr. Boston Rocking Chair Whiskey (R. 278); his first talk regarding such purchase was with (appellant) Abel; that Abel wanted to sell him 100 cases of whiskey (R. 279); that he had no previous appointment to meet Abel and such meeting was just accidental (R. 285); that he told Abel he was anxious to get whiskey and that Abel said, "I think I know some place where you might get some"; that Abel said, "Perhaps I can get you some whiskey" (R. 285); that he and Abel finally arrived at a price

of $65.00 a case; later he gave Abel a check for $2450 for the first 100 cases of whiskey (R. 279); after he received the bill for the whiskey he gave Abel the rest of the money in cash, totalling $6500 for 100 cases; he received an invoice from the Francisco Distributing Company; that the check for $2450 was made payable to the Francisco Distributing Company at Abel's direction (R. 279); that Abel told him he was to pay the balance in cash upon receipt of the bill; that Abel told him the selling price of the 100 cases was $2450. (R. 280.)

Reinburg further testified to a second purchase of Old Mr. Boston Rocking Chair Whiskey amounting to 100 cases at $65.00 a case; that the transaction was conducted the same as the first 100 cases (R. 281); that at about the 10th of December he went to the Francisco Distributing Company and attempted to buy some liquor; that the man behind the counter wouldn't give him any business at all; that the man he saw at the Francisco Distributing Company he did not see in the courtroom. (R. 283.) On examination of Reinburg, U. S. Exhibits Nos. 22, 23, 34 and 35 were admitted. These consisted of two bills and invoices, each for 100 cases of whiskey at $24.50 per case from the Francisco Distributing Company and two checks payable to that company and signed by Reinburg.

John Giometti testified that he operated the Owl Cafe, in Vallejo; that during December, 1943, or January, 1944, he purchased some liquor from the Francisco Distributing Company through Norman Reinburg; that he paid $65.00 a case for that whiskey.

and purchased 50 cases; that his only conversation about the whiskey was with Norman Reinburg (R. 289) at Reinburg's place of business; that subsequently 50 cases of whiskey were delivered to him in February, 1944; that he gave a check to Reinburg made out to the Francisco Distributing Company; it was a cashier's check for $1225 and he gave Reinburg the balance of $65.00 a case in cash of $2025. (R. 290.)

4. Incident of the first unidentified salesman.

Victor Figoni testified that he owns a saloon in El Cerrito; that in December, 1943, he purchased some Old Mr. Boston Rocking Chair Whiskey from some gentleman in the Francisco Distributing Company; that he bought 200 cases for himself and ordered 75 cases for Mr. Avila; that he had been looking over the courtroom for the last day or two and did not see the man he bought the whiskey from in the courtroom (R. 296); that he took two checks to the Francisco Distributing Company, his own for $4900 and Avila's check; that each check was payable to the Francisco Distributing Company; that the man he talked to told him to make out a check for $4900 for 200 cases and to bring the balance in cash to make up $60.00 a case; that he brought that amount of cash with him and gave the check and cash to the same man. (R. 298.)

Melvin Avila testified that he owned a tavern in El Cerrito; that all of his dealings relating to his purchase of 75 cases of whiskey were with Figoni and he paid $60.00 a case for the whiskey, which he paid by a check and in cash. (R. 300.)

5. **Incident of the second unidentified salesman.**

James Cernusco testified that he owned a tavern on Third Street in San Francisco; that in December, 1944, he purchased some Old Mr. Boston Whiskey for himself and two friends of his who owned a saloon in Livermore, named Vukota and Lewis. (R. 301-2.) A man came into his place and gave his name as Weiss or Wise; that he had not and did not see the man in the courtroom, although Cernusco had been in court for two days. The man said he was from the Francisco Distributing Company. (R. 302.) In December he gave this man a check for $450 drawn by Vukota and payable to Francisco Distributing Company, he also gave the man a check for $450 and one for $2000, each drawn by Lewis and payable to Francisco Distributing Company; Cernusco also gave the man $6100 in cash (R. 304), and a check for $2000 drawn by Vukota, payable to Francisco Distributing Company (R. 304); the man gave him three invoices of the Francisco Distributing Company, one for Lewis, one for Vukota and one for Cernusco. (R. 306-7.) Cernusco did not know and could not identify appellant Blumenthal. (R. 307.)

John Vukota testified that he owned a tavern in Livermore; that he purchased some Old Mr. Boston Whiskey; that he wrote the two checks, $450 and $2000, payable to Francisco Distributing Company, and gave them to Cernusco together with $3050 in cash, following which he received 100 cases of said whiskey. (R. 308.)

V. M. Lewis testified that he owned a tavern in Livermore; he purchased 100 cases of said whiskey; that he wrote the two checks, $450 and $2000, payable to Francisco Distributing Company, and gave them, together with $3050 in cash, to Cernusco. (R. 309.)

6. Incident of the third unidentified salesman.

Walter Vogel testified that he owned a tavern in San Francisco, that in December he bought some of the named whiskey; that "I don't know the fellow from whom I purchased it" (R. 345); that a man came into his tavern and asked him if he wanted to buy 100 cases of whiskey and he said he did (R. 345); that the man said, "I (Vogel) would have to pay him for the whiskey" (R. 346); the man said the whiskey would be $24.50 a case, but the man also said, "Now, then, you have to pay me for getting the whiskey for you". He paid $59.00 a case for the whiskey. The man told him to make a check out to the Francisco Distributing Company for $2450 and he gave the man the balance in cash, amounting to $3400. (R. 347.)

7. Incident of the fourth unidentified salesman.

Francis Duffy testified that he owned a tavern in Daly City; that he bought some of the whiskey from a fellow whose name he didn't know; the transaction took place in his tavern; that he had looked around the courtroom and hadn't been able to see the man. The man told him he might be able to get some whiskey. (R. 348.) The man came back and said he had some liquor lined up and that $24.50 a case is the price; that to make a certainty of getting the liquor

there will be a little premium (R. 350); the man said the premium will be $20.00 a case and the premium will have to be paid in cash. Duffy gave him a check for $2000, leaving the name of the payee in blank. (R. 351.) The man did not say the money was going through the Francisco Distributing Company. Later Duffy gave this man a check for $450 and $2000 in cash. Duffy never went to the Francisco Distributing Company.

8. Incident of the sale by Blumenthal to Lombardi.

Angelo Lombardi testified that he was a tavern owner in Santa Rosa and that he purchased 100 cases of Old Mr. Boston Whiskey; that he paid cash for the whiskey to a fellow in the Sportorium on Third Street in San Francisco (here witness identifies appellant Blumenthal as the man); that he paid $3050 in cash to Mr. Blumenthal; that Mr. Minkler was a tavern owner in Santa Rosa and Minkler had contacted the witness; the witness and Minkler went to San Francisco together to the Sportorium; that they did not see Blumenthal on this occasion; Minkler talked to some man there and later told the witness it would be o.k. about the whiskey. (R. 354.) Later the witness and Minkler again went to the Sportorium. On this occasion he saw Blumenthal and paid him the cash; that he had no conversation with Blumenthal; that the witness had written a check for $2450 payable to Clyde Minkler; that he received an invoice from the Francisco Distributing Company for 100 cases of whiskey and written on the invoice were the words, "Salesman Weiss". (R. 355-6.)

9. Incident of the sale to Fingerhut and Travis.

Herman Fingerhut testified that he owned a tavern in Vallejo and purchased some Old Mr. Boston Whiskey; that he went to the Sportorium and contacted a man there; that he paid $55.00 a case; that he did not know the man's name but that he looked similar to appellant Blumenthal. On his first visit to the Sportorium he was alone and talked to the man about whiskey. The man said he could probably get him some. The man told him the price was $55.00 a case for 200 cases; that he would have to pay for it by check representing $24.50 a case and the balance in cash. (R. 362-3.) The man told him to make out a check which he did for $2000, this was on his second visit to the Sportorium. (R. 363.) On the second visit to the Sportorium he saw Blumenthal and said he could only take 100 cases but he knew a man named Robert Travis who would take the other hundred cases; that he gave a deposit of $4000 in cash. (R. 364.) A few days later Travis and the witness went to the Sportorium and the witness said he would take 100 and Travis a hundred. The man told the witness to make out a check for $2000 to the Francisco Distributing Company, which he did; that he received an invoice from the Francisco Distributing Company for 100 cases; he also delivered the check for $450 payable to the Francisco Distributing Company; that later he purchased another 25 cases at the same place and from the same man. (R. 365) for $55.00 a case, together with 75 cases that Travis got; that he gave his money for this latter purchase to Travis. On the second purchase he wrote out a check for $612 payable

to the Francisco Distributing Company and delivered it to Travis together with cash, making the difference between $24.50 and $55.00 a case for 25 cases. (R. 368.)

Walter H. Travis testified that he owned a tavern in Vallejo; that he bought 175 cases of the named whiskey from Mr. Blumenthal in two purchases. First he bought 100 cases for $5500; that the man in the Sportorium told him to make out a check for $2000 to the Francisco Distributing Company which he did; that he took the check and the money to Blumenthal; that he paid Blumenthal $1050 in cash and mailed another check for $450 payable to the Francisco Distributing Company; that the first cash payment of $2000 he gave to Fingerhut; that later he purchased an additional 75 cases at $55.00 from Blumenthal at the Sportorium and 25 cases for Fingerhut. (R. 376.)

10. Incident of the Feigenbaum-Taylor sale.

The testimony as to this incident is the only evidence in the case which directly or indirectly involves the appellant Feigenbaum. The testimony was given by three witnesses Harry L. Taylor, Mrs. Taylor and Raymond C. Humes.

The evidence showed that Feigenbaum conducted a drugstore in San Francisco under the name of the Sunset Drug Store.

Henry L. Taylor testified in substance as follows: Mr. Humes and I operated a bar in Cottonwood, Shasta County (R. 316); Mr. Humes and I made a trip to San Francisco to get some whiskey. I met a man named Little Joe and Tucker in Litfle Joe's

saloon; I had not known either of them before. I asked if they could get me some whiskey and they said they could; they wouldn't tell where the whiskey was; I told them we would take 100 cases; they said it would cost Mr. Humes and me $64.00 (R. 323); they asked us for a $500 deposit which I gave them; I asked if I would get the $500 back if I did not get the whiskey and they said yes (R. 324); I paid Little Joe and Tucker the $500 in cash. I came back to San Francisco the 9th of December, as Tucker and Little Joe told us to come back in a week or ten days; I saw Little Joe and Tucker again and they took us to a drugstore on Mission Street which is the first time I met Mr. Feigenbaum; at the drugstore Mr. Humes, Tucker, Little Joe and I went into the drugstore; my wife remained in the car (R. 324); Little Joe introduced us to Feigenbaum and said we were the ones who put up the $500 for the whiskey and that it was a good thing we got there or we would have lost our deposit; Mr. Feigenbaum said we would get the $500 back if we didn't get the whiskey; then Feigenbaum instructed us to make out our check and I walked out and brought back my wife; Feigenbaum wanted us to take 200 cases, that he could get us 200 cases; he did not say he had 200 cases he would sell us (R. 325); he asked us for our liquor license as we would have to have those 200 cases recorded under our license; we told him we would take the hundred cases; Feigenbaum instructed Mrs. Taylor to make the check out for $4900; we said we might take 200 cases if we could handle it, and he said if we did not take the 200 he

would take 100 cases himself. I did not ask why the check should not be made out for $6400 or for $5900; we had already paid $500; the check for $4900 was made to the Francisco Distributing Company as that was the distributor Feigenbaum was dealing with; Mrs. Taylor made out the check and we left it and $1050 in cash, of which he already had $500 (R. 326); I didn't get a receipt for the $1050; my wife asked for a receipt for the $4900 check; she did not get one (R. 327); $50.00 to pay for the shipping of the whiskey was included in the $1050. I came back to San Francisco on the 23rd; my wife and I were on our way to Los Angeles; I had not received the whiskey; I saw Mr. Feigenbaum in the evening in his drugstore; my wife did not come in; he said the whiskey would be unloaded in a few days; I told him I couldn't take the 200 cases, I could only take 100 cases (R. 327); then Feigenbaum wrote out a check to me and told me to sign it; he wanted me to sign the check so that he could have it back again; he didn't tell me why; that was for the other hundred cases that we made the deposit on; the check for $4900 which I gave was the deposit on the 200 cases at first if we could take them; it was a deposit on an order from the Francisco Distributing Company for 200 cases of whiskey. On my last visit to the drugstore Feigenbaum told me he was going to take the other 100 cases and I said I was not going to take them; he wanted his records to show that I put up a deposit for half of that; it was to clear his records; I signed the check he wrote out. (R. 328.) He then showed me a bottle of whiskey and I bought a

case from him at the time for $64.00 in cash. I did not meet Feigenbaum again. I eventually got my 100 cases of whiskey. (R. 329.) At first we agreed to take 200 cases of whiskey; it was on the 23rd that I changed that original agreement.

Ruth Taylor, the wife of Henry Taylor, testified in substance as follows: The check to the Francisco Distributing Company for $4900 is my check and my signature appears thereon; I wrote that check in the Sunset Drugstore on December 9, 1943; my husband, Mr. Humes and Mr. Feigenbaum and a man named Tucker and one they named Little Joe was present; I wrote that check on Mr. Feigenbaum's instructions; he told me the amount and to whom I should make it payable; I did not witness the payment in cash of any money to Mr. Feigenbaum (R. 330); I asked if we would get a receipt for the check and Feigenbaum said the check would answer as a receipt. I had no other discussion and didn't hear any of the transactions; I left after I wrote the check. (R. 331.)

Raymond C. Humes testified (R. 332-342) in substance the same as Henry L. Taylor with the following amplifications: Feigenbaum asked us fifty cents a case to pay for the freight; Feigenbaum said he wanted a check for $24.50; he said that was going to the distributor and that we would have to come through with a $1050 in cash (R. 335); on December 9 Mr. Taylor and I agreed to take 200 cases. Later we got to talking it over and thought we could only handle 100 cases; we wrote the check in anticipation of taking 200 cases; I never met Feigenbaum before and saw him only

on that one occasion. (R. 237.) It is a fact that the check for $4900 was to be made out because that was the money the distributing company was to get for the whiskey; Feigenbaum said the balance would have to be paid in cash to him; Feigenbaum told us we would have to make a check for $4900 for 200 cases "which was what the distributing company was going to get, and the balance of the cash was what he was going to get". (R. 341.) We gave altogether the check for $4900, and $1000, plus $500 I had given to Mr. Tucker, all of which made $6400 and $50 for freight. We were told that we would have to make out the check for the number of cases at $24.50 a case. (R. 342.)

At the conclusion of the evidence in the case petitioner moved the trial Court for a directed verdict of not guilty. (R. 421-2.) Motion denied and exception noted. (R. 422.)

Petitioner submitted three requested instructions (R. 133, 134, 135) to the effect that as to Feigenbaum the conspiracy charged and his connection therewith could not be established by the acts and declarations of his alleged co-conspirators, but had to be established by independent evidence. The trial Court not only refused to give such requested instructions but, in effect, instructed the jury to the contrary (R. 443), to all of which exceptions were duly noted. (R. 449.)

The Circuit Court of Appeals, Judge Denman dissenting, affirmed the conviction and judgment.

SPECIFICATIONS OF ERRORS RELIED ON.

1. The majority opinion of the lower Court is in error in holding that where an indictment charges five defendants with a single conspiracy, such single conspiracy is established by evidence which only established several separate and distinct conspiracies in each of which no more than two of the codefendants participated.

2. The majority opinion of the lower Court is in error in holding that, where five persons are charged with a conspiracy, the conviction of one can be upheld where the only proof of the conspiracy and such person's connection therewith consists of the acts and declarations of his alleged co-conspirators, done and said out of his presence.

3. The majority opinion of the lower Court is in error in holding that essential and ultimate facts, necessary to establish a charge of conspiracy, can be established by inference based upon other inferences.

4. The majority opinion of the lower Court is in error in failing to pass upon, and therefore inferentially approving, the refusal of the trial Court to give requested instructions to a jury on a basic issue involved in a trial for conspiracy, such requested instructions being in substance that, in determining the existence of the conspiracy charged and a defendant's connection therewith, the acts and declarations of alleged co-conspirators cannot be considered.

5. The majority opinion of the lower Court is in error in holding two or more persons may be prose-

cuted for a felony conspiracy under the general conspiracy statute, in conspiring to sell whiskey at a price in excess of the maximum selling price established under the Emergency Price Control Act, where the latter Act makes an agreement so to do a substantive offense punishable as a misdemeanor.

ARGUMENT.

1. THE EVIDENCE WAS INSUFFICIENT TO ESTABLISH THE SINGLE CONSPIRACY CHARGED IN THE INDICTMENT.

Assuming, merely for this phase of the argument, that all of the evidence was properly admitted against Feigenbaum, such evidence failed to establish the single conspiracy charged and did no more than, if believed, establish seven separate and distinct conspiracies, in no one of which was any more than two of the defendants involved, and in no more than one of which was either Abel, Blumenthal, or Feigenbaum involved.

The evidence, a complete summary of which is set forth above, established that seven different people made or negotiated sales of 1575 cases of the whiskey. In each case the Francisco Distributing Co. (Goldsmith) received checks for only $24.50 a case, the surplus paid in cash being received and retained by the person making the sale.

The evidence failed to establish many essential factors, which are correctly stated in the dissenting opinion of Judge Denman in dealing with the evi-

dence as to Feigenbaum, Abel and Blumenthal, as follows:

> "The court's opinion is bare of facts, as is the evidence,
>
> "(1) That any of these three knew or was in any communication with any others of them;
>
> "(2) That any knew that any other obtained whiskey from the defendants Goldsmith and Weiss;
>
> "(3) That any of the three sellers knew that any other of them bought the whiskey from the so-called 'common pool' of whiskey in the warehouse—a common pool only in the sense that each separately obtained his whiskey from it, but not a pool of which any of the three had common knowledge that any other of them had obtained his whiskey from it;
>
> "(4) That any knew that any other bought his whiskey at the same below-ceiling price;
>
> "(5) That any knew that any other sold his whiskey at the same or similar over-ceiling prices." (R. 500.)

and in dealing with Goldsmith and Weiss said:

> "The court's opinion states no facts and the record has none showing that either Weiss or Goldsmith knew that any whiskey was sold at such higher prices, much less than there was any agreement with the three (Abel, Blumenthal and Feigenbaum) or any one of them for such prohibited sales." (R. 503.)

The case is thus brought squarely within the facts and the law as recently announced by this Court.

In *Kotteakos v. United States*, 328 U. S. ....., 90 L. ed. Ad. Op. 1178, this Court reversed convictions on a record similar to the one in the case at bar and explained and modified the holding in the case of *Berger v. United States*, 295 U. S. 78.

In the *Kotteakos* case the indictment charged a general conspiracy in which a number of people operating through a common key figure, Simon Brown, were to make applications to various financial institutions for credit with the intent that the loans or advances would then be offered to the FHA for insurance upon applications containing false and fraudulent information. Seven of the defendants charged were found guilty. The evidence established that several applications for such loans had been made through the key figure Brown, but as this Court states "no connection was shown between them and petitioners, other than that Brown had been the instrument in each instance for obtaining the loans. In many cases the other defendants did not have any relationship with one another, other than Brown's connection with each transaction".

(Note the similarity between the facts in the *Kotteakos* case and the case at bar. While Feigenbaum and the other defendants were all conducting the same kind of transaction, no connection was shown between them other than that Goldsmith was the central distributing point from which the whiskey was procured.)

Following the foregoing language this Court says:

> "The proof therefore admittedly made out a case, not of a single conspiracy, but of several,

notwithstanding only one was charged in the indictment. Cf. United States v. Falcone, 311 U. S. 205, 85 L.ed. 128, 61 S.Ct. 204; United States v. Peoni (CCA 2d), 100 F.2d 401; Tinsley v. United States (CCA 8th), 43 F.2d 890, 892, 893. The Court of Appeals aptly drew analogy in the comment, 'Thieves who dispose of their loot to a single receiver—a single "fence" do not by that fact alone become confederates; they may, but it takes more than knowledge that he is a "fence" to make them such.' "

(Again note how applicable to the present case is the foregoing language. The mere fact that the liquor was procured from a single dispenser does not make all the persons procuring such liquor confederates.)

In discussing the ruling announced in *Berger v. United States, supra,* the Supreme Court put the question as follows:

"The question we have to determine is whether the same ruling may be extended to a situation in which one conspiracy only is charged and at least eight having separate, though similar objects, are made out by the evidence, if believed; and in which the more numerous participants in the different schemes were, on the whole, except for one, different persons who did not know or have anything to do with one another."

and held that under such circumstances the doctrine of the *Berger* case was inapplicable and at page 1189 states:

"The jury could not possibly have found, upon the evidence, that there was only one conspiracy. The trial court was of the view that one con-

spiracy was made out by showing that each defendant was linked to Brown in one or more transactions, and that it was possible on the evidence for the jury to conclude that all were in a common adventure because of this fact and the similarity of purpose presented in the various applications for loans.

"This view, specifically embodied throughout the instructions, obviously confuses the common purpose of a single enterprise with the several, though similar, purposes of numerous separate adventures of like character."

On the same page the Court points out the evil resulting from such circumstance in that the Court there, as did the Court here (R. 440-441), instructed the jury that any overt act done by one defendant would be sufficient to complete the proof of the crime as against all.

On page 1191 the entire matter is summed up by the Supreme Court as follows:

"Here the toleration went too far. We do not think that either Congress, when it enacted § 269, or this Court, when deciding the Berger Case, intended to authorize the Government to string together, for common trial, eight or more separate and distinct crimes, conspiracies, related in kind though they might be, when the only nexus among them lies in the fact that one man participated in all."

and that prejudicial error occurred is announced on page 1192:

"With all deference we disagree with that conclusion and with the rule that the permeating

> error did not affect 'the substantial rights of the parties.' That right, in each instance, was the right not to be tried *en masse* for the conglomeration of distinct and separate offenses committed by others as shown by this record."

In the instant case we have the identical situation presented in the *Kotteakos* case. Four sales were conducted by mysterious salesmen and independent sales made by Abel, Blumenthal and Feigenbaum. Thus, we find at least seven separate and distinct transactions participated in by separate and distinct parties, the only "nexus among them" being "in the fact that one man (Goldsmith) participated in all".

The reasons stated in the majority opinion as being sufficient to justify the verdict of the jury consist merely of inference piled upon inference and **each matter stated as a material ultimate fact is but an inference based upon another inference.**

It is the fundamental and invariable rule of evidence that where a case depends upon circumstantial evidence, inference cannot be based upon inference nor presumption upon presumption. An inference must be based upon a fact established by direct evidence and such fact, as the predicate for an inference, cannot be either inferred or presumed. In this regard see the following cases:

> *U. S. v. Ross,* 2 Otto, 281, 23 L. ed. 707, 708;
> *Vernon v. United States,* 146 Fed. 121, 126;
> *Brady v. United States,* 24 Fed. (2d) 399, 403.

The matters which the majority opinion states as ultimate facts which the jury was justified in finding

contain many statements violative of the foregoing rule.

The majority opinion states that when the sale was made by Feigenbaum "the facilities of Francisco were thereupon used * * * for the purpose of clearing their sales through the books of Francisco with the knowledge and cooperation of Goldsmith and Weiss." (R. 486.) Manifestly this is a statement to the effect that Goldsmith and Weiss knew that Feigenbaum, Abel and Blumenthal were selling at prices exceeding the ceiling price and that the books of Francisco were used for such purpose. There is no evidence in the record to this effect and the same constitutes but a mere conjecture.

The opinion goes on to state that Feigenbaum, together with Abel and Blumenthal shared in a common access to the stock or pool of whiskey. (R. 487.) That Feigenbaum made one purchase for himself and one sale to the Taylors of the whiskey involved is all that appears in the record. The evidence does not establish that he knew that either Abel or Blumenthal could either purchase or sell from this stock of whiskey. Nor is there any evidence to establish that Feigenbaum could have either purchased for himself or others any more than the two hundred cases involved in his individual transaction. The statement that these three individual defendants shared in a common access to the stock of whiskey is but an inference drawn by the Court. The opinion states that when the checks to Francisco were cleared through its books "and the side money payments collected by

Abel, Blumenthal and Feigenbaum, the whiskey was delivered by Francisco to these purchasers." (R. 488.) While this is a statement of the chronological occurrence of the facts, it contains the inference that Francisco only delivered the whiskey when Goldsmith or Weiss knew that Feigenbaum, Abel or Blumenthal had collected over-ceiling prices. There is no evidence in the record to justify such an inference.

The opinion further states that if the jury was convinced of the events established by direct evidence "then the jury was justified in inferring that appellants were parties to a single agreement and conspiracy to commit the offenses charged." (R. 489.) In order to arrive at the conclusion that "appellants were parties to a single agreement and conspiracy" it is necessary to indulge in a series of inferences. Thus, it would have to be inferred either that Feigenbaum was acquainted with Abel and Blumenthal and with either Goldsmith or Weiss. There is no evidence to this effect in the record. Next, the inference would have to be drawn that being so acquainted Feigenbaum agreed, expressly or tacitly, with Abel, Blumenthal, Goldsmith or Weiss that the whiskey was to be sold to retailers above the ceiling price, or that Feigenbaum had knowledge that Abel and/or Blumenthal on the one hand and Goldsmith and/or Weiss on the other hand had entered into an understanding whereby the first parties were to sell the whiskey above the ceiling price and that the parties representing Francisco were to further such sales by shipping the goods and issuing invoices at the ceiling

price. There is no evidence in the record to justify this inference. Further, the inference has to be drawn that Goldsmith and/or Weiss knew that Feigenbaum was selling the whiskey above the ceiling price and that they filled the order to the Taylors with knowledge of this fact and for the purpose of furthering the unlawful activity of Feigenbaum. There is no evidence in the record in this regard. The mere proof that Francisco was issuing invoices at $24.50 a case and received but $24.50 a case will not justify an inference that the Francisco people knew that someone else was selling this whiskey above the ceiling price. The fact that Feigenbaum, Abel and Blumenthal each sold whiskey above the ceiling price will not justify the inference that one knew the other was so doing.

As to petitioner Feigenbaum the prejudicial effect of the manner in which the cause was presented to the jury is identical with the situation in the *Kotteakos* case.

Thus, the Court charged the jury that they could find the defendants guilty if they were satisfied beyond a reasonable doubt that a conspiracy as charged in the indictment was entered into between two or more of the defendants and that in addition to such conspiracy—between two or more defendants—one or more of the overt acts described in the indictment was done by one or more of the defendants to effect the object of the conspiracy. (R. 440-441.) Then the Court charged the jury, "If persons pursue by their acts the same unlawful object, one performing one act and

a second another act, all with a view to the attainment of the object they are pursuing, the conclusion is warranted that they are engaged in a conspiracy to effect that object." (R. 441-442.) In charging about the overt acts the trial Court said, "if during the existence of the conspiracy the overt act is done by one of the conspirators to effect the object of the conspiracy, the crime is complete, and it is complete as to every party found by you to be a member of the conspiracy no matter which one of the parties did the overt act." (R. 444.)

Under the foregoing charge the jury was instructed that if they found that the several defendants were each indulging in acts that resulted in selling whiskey above the ceiling price and that they had the same purpose in mind, they would be justified in finding that they were conspiring together for such unlawful purpose and that proof of any one overt act, out of the ten charged in the indictment, would be sufficient upon which to predicate a verdict of guilty. There was withdrawn from the jury, under these instructions, the power of the jury to determine whether the acts committed by each defendant constituted but a separate and isolated transaction or a separate conspiracy involving the Francisco people and such defendant, all as distinguished from a general conspiracy in which all defendants participated. The finding of the jury that the single conspiracy existed may find justification under the instructions as given by the Court, but is without support in the evidence and directly contrary thereto. As this Court said in the *Kotteakos* case:

"On those instructions it was competent not only for the jury to find that all of the defendants were parties to a single common plan, design and scheme, where none was shown by the proof, but also for them to impute to each defendant the acts and statements of the others without reference to whether they related to one of the schemes proven or another, and to find an overt act affecting all in conduct which admittedly could only have affected some."

---

2. **THE LOWER COURT, IN ORDER TO ESTABLISH THE CONSPIRACY CHARGED, HAS RESORTED TO THE ACTS AND DECLARATIONS OF FEIGENBAUM'S CO-CONSPIRATORS, SUCH EVIDENCE BEING INCOMPETENT FOR SUCH PURPOSE.**

It is the law that the existence of a conspiracy cannot be established against an alleged conspirator by evidence of the acts or declarations of an alleged co-conspirator done or made in his absence. It is also the law that in determining the sufficiency of the evidence to establish a conspiracy the acts and declarations of an alleged co-conspirator cannot be considered for any purpose.

In the instant case evidence as to the acts and declarations of Abel, Blumenthal and the several unidentified salesmen, when offered as evidence against Feigenbaum, was strenuously objected to on the ground that such evidence was not admissible against him until there had been independent proof of the conspiracy charged and Feigenbaum's connection therewith and that there was no such independent

evidence. (R. 393 to 409.) The trial judge overruled these objections and admitted all such evidence against Feigenbaum. In determining the sufficiency of the evidence the majority opinion considers such incompetent testimony for the purpose of establishing the conspiracy and Feigenbaum's connection therewith and had to do so in order to uphold the judgment as there was no other evidence in the case.

Omitting the evidence of the sales made by Abel and Blumenthal and the four unidentified salesmen, the only evidence pertaining to Feigenbaum is that he made one sale of 100 cases of whiskey to Taylor and Humes, paying to the Distributing Co. $24.50 per case therefor although he charged Taylor and Humes $64 per case. This evidence is wholly insufficient to establish the conspiracy charged.

The rules contended for by petitioner have been firmly established by this Court in the *Kotteakos* case, supra, a pertinent portion of which decision we have above quoted to the effect that the overt acts of alleged co-conspirators are incompetent and cannot be used to establish the conspiracy against a particular defendant. Such is also the rule announced in the following cases:

> "The existence of the conspiracy cannot be established against an alleged conspirator by evidence of the acts or declarations of his alleged co-conspirators done or made in his absence."
>
> *Minner v. United States*, 57 Fed. (2d) 506, 511.

> "The existence of the conspiracy charged cannot be established against an alleged conspirator

by evidence of the acts or declarations of his alleged co-conspirator done or made in his absence. Hauger v. United States (C.C.A. 4) 173 F. 54, 57. United States v. Richards (D. C. Nev.) 149 F. 443; United States v. Goldberg, supra; United States v. McKee, supra.

"Therefore the statements made and acts done by Gorges in the absence of appellants should not be considered in determining whether the evidence established the connection of appellants with such conspiracy."

Thomas v. United States (CCA-10), 57 Fed. (2d) 1039, 1042.

In *Glasser v. United States,* 315 U. S. 60, 86 L. ed. 680, four persons were indicted for conspiracy to defraud the United States. During the trial witnesses testified to statements made by the defendant Kretske during the course of the alleged conspiracy which implicated Glasser. Glasser claimed that such testimony could not be considered as evidence against him in determining whether a conspiracy existed and that he was a party thereto. The Supreme Court upheld this contention and reversed the case as to Glasser stating, at page 74 of the reported case, as follows:

"Glasser contends that such statements constituted inadmissible hearsay as to him * * *. The Government attacks this argument as unsound, and, relying on the doctrine that the declarations of one conspirator in furtherance of the object of the conspiracy made to a third party are admissible against his co-conspirators, Logan v. United States, 144 US 263, 36 L. ed. 429, 12 S Ct

617, contends that the declarations of Kretske were admissible against Glasser and hence no prejudice could arise from Stewart's failure to object. **However, such declarations are admissible over the objections of an alleged co-conspirator, who was not present when they were made, only if there is proof aliunde that he is connected with the conspiracy.** Minner v. United States (CCA 10th) 57 F. (2d) 506; and see Nudd v. Burrows, 91 US 426, 23 L ed 286. **Otherwise hearsay would lift itself by its own boot straps to the level of competent evidence."**

The foregoing rule has been recognized and applied in the Ninth Circuit in the following cases:

Dolan v. United States (CCA-9), 123 Fed. 52, 54;

Kuhn v. United States (CCA-9), 26 Fed. (2d) 463;

Sugarman v. United States (CCA-9), 35 Fed. (2d) 663.

As the evidence of the seven incidents relating to sales, in which the defendant Feigenbaum was not involved, cannot be considered in determining whether the evidence established the conspiracy charged and Feigenbaum's connection therewith, we are left with no other evidence in the case except the isolated sale by Feigenbaum to Taylor and Humes. Therefore there is no competent evidence in the record to establish either the conspiracy charged or Feigenbaum's connection therewith.

3. **THE REFUSAL TO GIVE FEIGENBAUM'S REQUESTED INSTRUCTIONS 27, 28 AND 29 CONSTITUTES REVERSIBLE ERROR AS BEING A MISDIRECTION OF THE JURY ON A BASIC ISSUE.**

There was no more important phase of the trial than the charge of the Court to the jury. In order that the correct rules of law be given to the jury Feigenbaum submitted three requested instructions numbered 27, 28, and 29 (R. 458-9), reading as follows:

> "In order for you to find the defendant Albert Feigenbaum guilty of the crime of conspiracy as charged in the indictment it is necessary that you find, among other things, to a moral certainty and beyond a reasonable doubt that a conspiracy existed between at least two persons to do the things set forth in the indictment and that Albert Feigenbaum was a member of such conspiracy. In determining whether such conspiracy existed and that Feigenbaum was a member of such conspiracy you cannot take into consideration and must disregard all testimony and evidence relating to the acts and declarations of any alleged conspirator, other than the defendant Feigenbaum, said or done out of the presence of the defendant Feigenbaum. The existence of the conspiracy charged and Feigenbaum's connection therewith must be established by evidence independently of the acts and declarations of any alleged co-conspirator of Feigenbaum's said or done out of the presence of the defendant Feigenbaum." (R. 458.)

> "In determining whether a conspiracy existed, as charged in the indictment, and that the defendant Feigenbaum was a member of such conspiracy,

I instruct you that you cannot consider testimony of the acts or declarations of any other person, charged in the indictment with being a co-conspirator with Feigenbaum, where such acts or declarations were done or made out of the presence of defendant Feigenbaum." (R. 458.)

"In determining whether the conspiracy charged in the indictment existed and that Albert Feigenbaum was a member of such conspiracy you must reject and disregard all evidence and testimony in the case relating to anything said or done, out of the presence of defendant Feigenbaum, by the defendants Goldsmith, Blumenthal, Weiss and Abel." (R. 459.)

The Court refused to give the foregoing instructions to which refusal Feigenbaum duly excepted.

We have heretofore argued the incompetency of evidence dealing with acts and declarations of Feigenbaum's alleged co-conspirators and that such evidence could not be considered to establish the conspiracy charged or Feigenbaum's connection therewith. We will not repeat that argument here.

The existence of the conspiracy as charged and Feigenbaum's connection therewith were basic issues in the case and the refusal of the Court to charge the jury as requested and in effect charging the jury directly contrary thereto was prejudicial error necessitating a reversal of the judgment.

The majority opinion does not directly pass upon this matter but approves as a whole the charge given by the trial Court to the jury and concludes on this

point by stating, "From our examination we are satisfied that the instructions, taken as a whole, correctly presented the law to the jury." (R. 498.)

Repeatedly throughout the majority opinion are statements to the effect that the evidence was sufficent to establish petitioner's guilt beyond a reasonable doubt and apparently the conclusion is drawn that as the evidence was sufficient to establish petitioner's guilt any error in the procedure by which that guilt was established became insignificant and non-prejudicial.

To demonstrate that the reasoning in the majority opinion is erroneous we need but look at the recent decision of this Court in *Bollenbach v. United States*, 326 U. S. 607, 90 L. ed. 318, where in dealing with the duty to properly charge the jury, this Court said:

> "Discharge of the jury's responsibility for drawing appropriate conclusions from the testimony depended on discharge of the judge's responsibility to give the jury the required guidance by a lucid statement of the relevant legal criteria."

and later states:

> "A conviction ought not to rest on an equivocal direction to the jury on a basic issue."

The question was raised that the error was not prejudicial as there was abundant evidence of guilt. This court disposed of this contention as follows:

> "In view of the Government's insistence that there is abundant evidence to indicate that Bollenbach was implicated in the criminal enterprise

from the beginning, it may not be amiss to remind that the question is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials in the federal Courts."

Lastly, it was held that a misdirection on a vital issue was not one of those "technical errors" which "do not affect the substantial rights of the parties" and concluded its opinion as follows:

"In view of the place of importance that trial by jury has in our Bill of Rights, it is not to be supposed that Congress intended to substitute the belief of appellate judges in the guilt of an accused, however justifiably engendered by the dead record, for ascertainment of guilt by a jury under appropriate judicial guidance, however cumbersome that process may be."

---

4. THE MAJORITY OPINION IS IN ERROR IN HOLDING THAT THE OFFENSE COULD BE LAID UNDER THE GENERAL CONSPIRACY STATUTE OF THE UNITED STATES.

The Emergency Price Control Act (50 U.S.C.A. App.) makes it a substantive offense (a misdemeanor) to agree to violate any regulation of the administrator. There cannot be a conspiracy to conspire. As the acts alleged in the indictment constitute a violation of the Emergency Price Control Act they cannot constitute a violation of section 88 of Title 18, U.S.C.A.

Section 4 (a) of the Emergency Price Control Act reads as follows:

"Sec. 4. (a) It shall be unlawful, regardless of any contract, agreement, lease, or other obligation hertofore or hereafter entered into, for any person to sell or deliver any commodity, or in the course of trade or business to buy or receive any commodity, or to demand or receive any rent for any defense-area housing accommodations, or otherwise to do or omit to do any act, in violation of any regulation or order under §2, or of any price schedule effective in accordance with the provisions of §206, or of any regulation, order, or requirement under § 202 (b) or § 205 (f), or to offer, solicit, attempt, **or agree to do any of the foregoing.**"

Section 205(b) denounces as a misdemeanor any violation of the foregoing section.

In the criminal law "conspiracy" and "agreement" are synonymous. To conspire is to agree. (*Morrison v. California,* 291 U. S. 82, 54 S. Ct. 281, 78 L. ed. 664; *Marcenty v. U. S.,* 49 Fed. (2d) 156; *Wright v. United States,* 108 Fed. 805.)

The Emergency Price Control Act denounces as a substantive offense a conspiracy to violate a regulation of the Administrator. Where two persons are necessary to the commission of a substantive offense the same two cannot be guilty of conspiring to commit such substantive offense. As it requires two parties to commit the substantive offense denounced by the Emergency Price Control Act these same people cannot be guilty of conspiring to commit such offense. In support of the rule, we call attention to the following cases:

United States v. Sager, 49 Fed. (2d) 725;
Norris v. United States, 34 Fed. (2d) 839;
U. S. v. Katz, 271 U. S. 354, 7 L. ed. 986;
Gebardi v. United States, 287 U. S. at 119, 77 L. ed. 209.

The majority opinion attempts to avoid the foregoing conclusion by alleging that the general conspiracy statute "includes as a necessary element the commission of an overt act. There is no mention of the overt act in pursuance of the agreement alluded to in the Emergency Price Control Act." (R. 485.) And concludes that such is "a clear and striking distinction" between the misdemeanor and felony agreements.

It is apparent that the entire scheme embodied in the Emergency Price Control Act was to punish merely as misdemeanors persons who in any manner sought to sell commodities above the established maximum price and this irrespective of whether it was done as the act of one individual or as the act of two or more individuals.

The purpose of the act was to regulate the price of commodities rather than the conduct of the person dealing in commodities. To put a greater punishment upon two people who sell one article above the maximum price would seem a plain distortion of the statute. To illustrate: A is the sole operator of a store and sells an article above the maximum price. He can be punished only for committing a misdemeanor. On the other hand B and C are partners running the

same kind of a store and selling the same article; if they sell above the ceiling price they can be prosecuted for a felony on the ground that they agreed so to do and in actually selling committed an overt act. This plainly was not the intention of the Congress.

The reasoning adopted in the majority opinion places the higher punishment not on the agreement to do the act but on an overt act done pursuant to the agreement, which overt act may in itself be entirely innocent. In all conspiracies the gist and substance thereof is the unlawful agreement. (See, *Pinkerton v. United States*, ... U. S. ....., 90 L. ed. Ad. Op. 1212, 1215.) In the latter case, at page 1214, this Court states that the only act that need be done in furtherance of a general criminal conspiracy is the completed crime itself. Applying this to the Emergency Price Control Act the only thing following an agreement to sell need be the sale. Every sale includes an agreement to sell because every sale is a contract. The Congress clearly intended to withdraw from the general conspiracy statute, sales and agreements to sell, and the conclusion reached in the majority opinion is erroneous.

CONCLUSION.

The foregoing we believe demonstrates that petitioner was tried and convicted in a manner not consistent with the rules and procedure applicable to the trial of causes in our Federal Courts; that the majority opinion has decided important issues of law in manner contrary to the decisions of this Court and that the writ should issue as prayed for.

Dated, San Francisco, California,
March 24, 1947.

Respectfully submitted,
LEO R. FRIEDMAN,
Attorney for Petitioner.